

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHAUN MATHEW ROBERTS,

Defendant-Appellant.

UNPUBLISHED

August 17, 2004

No. 247217

St. Joseph Circuit Court

LC No. 01-010609-FC

Before: Fort Hood, P.J., and Donofrio and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction by a jury of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a). The trial court sentenced him to a term of life in prison. We affirm.

The instant case stems from allegations that defendant sexually abused his three-year-old stepdaughter. Defendant contends that the prosecution presented insufficient evidence to sustain his conviction. We review de novo challenges to convictions based on the sufficiency of the evidence. *People v Wolfe*, 440 Mich 508, 513; 489 NW2d 748, amended 441 Mich 1202 (1992). Prosecutors must introduce evidence sufficient to justify a rational trier of fact in concluding that all of the essential elements of the crime were proved beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). When reviewing the sufficiency, the court examines the evidence in the light most favorable to the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). This includes all determinations concerning the credibility of witnesses. *Wolfe*, *supra* at 514-515.

Under MCL 750.520b(1)(a), a person is guilty of CSC I if the person engages in sexual penetration with another person and the victim is under the age of thirteen. *People v Hack*, 219 Mich App 299, 303; 556 NW2d 187 (1996). MCL 750.520a(o) defines sexual penetration as “sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person’s body or of any object into the genital or anal openings of another person’s body.”

In the instant case, the victim testified that defendant touched her “in my privates,” but stated that she did not remember whether he put anything inside her. But child psychologist Leneigh White testified that during a counseling session, when explaining what occurred, the victim demonstrated what appeared to be sexual intercourse and fellatio using anatomically

correct dolls. In addition, Dr. Colleen Gushurst testified that while examining the victim's vaginal area, she discovered a healed disruption on her hymen. The doctor stated that this created a suspicion that some form of penetration had occurred and caused her to ask the victim whether anyone had touched her there. The victim responded that defendant had rubbed her with "his" and indicated that she had felt this inside her labia majora. This testimony provided evidence on the element of sexual penetration. And it is undisputed that the victim is under age thirteen. Viewed in the light most favorable to the prosecution, a rational jury could have found that the prosecution proved all elements of CSC I beyond a reasonable doubt.

Defendant next contends that the trial court abused its discretion in denying his motion for a mistrial because he did not have an opportunity to cross-examine the victim. But because defendant declined an opportunity to cross-examine her, he has waived any claim that his rights under the Confrontation Clause were violated.

In *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000), our Supreme Court stated that a defendant cannot waive an objection to an issue at trial and then make a claim of error on appeal. The Court found that because the defendant's counsel had expressed satisfaction with the trial court's jury instructions, the defendant had waived the issue. *Id.* Waiver is presumed to be "available in 'a broad array of constitutional and statutory provisions.'" *Id.* at 217-218, quoting *New York v Hill*, 528 US 110; 120 S Ct 797; 145 L Ed 2d 560 (2000). Defendants must personally waive "certain fundamental rights such as the right to counsel or the right to plead not guilty." *Id.* at 218. But attorneys have full authority to "manage the conduct of the trial" and determine trial strategy. *Id.* at 218-219. Concerning such issues, waiver can be "effected by the action of defense counsel." *Id.* Waiver "*extinguishes* any error" and precludes appellate review. *Id.* at 216 (emphasis in original.)

In the instant case, when the victim first took the stand, she became frightened and was unable to respond to the prosecutor's questions. But after a forty-minute recess, she regained her composure and was able to testify that defendant had touched her privates. After this testimony, the prosecution released her for cross-examination. Although the victim remained upset, the record does not indicate that she was unable to give further testimony or respond to cross-examination. Even if it would have been difficult to cross-examine the victim, this would not have violated defendant's rights. "Although a defendant must be given an opportunity for cross-examination, the defendant has no constitutional right to a successful cross-examination." *People v Watson*, 245 Mich App 572, 584; 629 NW2d 411 (2001), citing *People v Chavies*, 234 Mich App 274, 283; 593 NW2d 655 (1999).

When the prosecution released the victim, defendant's trial counsel stated, "I don't have any questions." This constituted an express waiver of the issue. And defendant's lawyer had the authority to waive the right to confrontation on behalf of her client. Decisions regarding "whether to call or question witnesses are presumed to be matters of trial strategy." *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002), citing *People v Rockey*, 237 Mich App 74, 77; 601 NW2d 887 (1999). Under *Carter*, a lawyer can waive such issues without the consent of her client.

Additionally, defendant claims the trial court should have ordered a mistrial on the grounds that the victim was not competent to testify. Because defendant failed to preserve this

issue, we review it for plain error affecting his substantial rights. *People v Nash*, 244 Mich App 796; 625 NW2d 87 (2000).

“The determination of the competency of a witness is a matter within the discretion of the trial court.” *People v Breck*, 230 Mich App 450, 457; 584 NW2d 602 (1998), citing *People v Burch*, 170 Mich App 772, 774; 428 NW2d 772 (1988). And a presumption exists that all witnesses are competent to testify. *Watson*, *supra* at 583, citing *People v Coddington*, 188 Mich App 584, 597; 470 NW2d 478 (1991). MRE 601 sets forth this principle as follows:

Unless the court finds after questioning a person that the person does not have sufficient physical or mental capacity or sense of obligation to testify truthfully and understandably, every person is competent to be a witness except as otherwise provided in these rules.

In *Watson*, *supra* at 583, this Court stated that the test for competency is “whether the witness has the capacity and sense of obligation to testify truthfully and understandably.” We then held that the trial court did not abuse its discretion in allowing a seven-year-old child to testify because the record as a whole demonstrated he “knew the difference between telling the truth and telling a lie and promised to tell the truth.” *Id.*, citing *Breck*, *supra* at 457.

Similarly in the instant case, the record shows that the victim had the capacity to testify. The victim, who was seven years old at the time of her testimony, responded affirmatively when the trial court asked if she was going to tell what she knew and promised to tell the truth. Although the trial court made no express finding regarding the victim’s competency, it allowed her to testify. By doing so, it implicitly found her competent to testify. *People v Kasben*, 158 Mich App 252, 257; 404 NW2d 723 (1987). Defendant points to the fact that the victim was distraught and needed a forty-minute recess to regain her composure as proof that she was not competent to testify. But competency under MRE 601 is a threshold issue that must be determined before a witness testifies. Any difficulties that a child witness has after the trial court has determined that he is able to testify “relate to his credibility, not his competency.” *Watson*, *supra* at 584. As in *Watson*, the trial court did not abuse its discretion in finding the victim competent to testify. Therefore, no plain error occurred and we refuse to further review the issue.

Defendant also argues that the trial court abused its discretion in allowing Dr. Gushurst to testify concerning hearsay statements made by the victim during her examination. Decisions on whether to admit evidence are reviewed for abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999), citing *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). An abuse of discretion exists where “an unprejudiced person would find no justification for the ruling made.” *People v Rice (On Remand)*, 235 Mich App 429, 439; 597 NW2d 843 (1999).

MRE 801(c) defines hearsay as a declarant’s out-of-court statement offered to prove the truth of the matter asserted. Hearsay is inadmissible as substantive evidence unless one of the exceptions in the rules of evidence applies. *People v Poole*, 444 Mich 151, 159; 506 NW2d 505 (1993). One such exception, MRE 803(4), allows the admission of hearsay statements

made for purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history, or past or present

symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably necessary to such diagnosis and treatment.

Defendant contends that the trial court abused its discretion in allowing Dr. Gushurst to testify pursuant to MRE 803(4) because the examination took place to obtain evidence for trial rather than for a legitimate medical purpose. This Court considered the same issue in *People v Van Tassel (On Remand)*, 197 Mich App 653, 658-659; 496 NW2d 388 (1992). In that case, the probate court had ordered the examination to determine whether the child had been injured or abused and if such injuries were accidentally or intentionally inflicted. *Id.* at 659. This Court found that, while the examination of the child may have bolstered the ongoing investigation of the defendant, “the health and welfare of the child” was the primary motivation for the order. *Id.* at 659-660. In support of this holding, it quoted the following passage from *People v Conn*, a companion case to *People v Meeboer*, 439 Mich 360, 334-335; 484 NW2d 621 (1992):

Treatment and removal from an abusive environment is medically beneficial to the victim of a sexual abuse crime and resulted from the victim’s identification of the assailant to her doctor. The questions and answers regarding the identity of her assailant can therefore be regarded as reasonably necessary to this victim’s medical diagnosis and treatment.

In the instant case, the prosecution contended that the victim’s examination took place at the behest of the Family Independence Agency (FIA). It argued that the agency had received allegations that the victim had been abused and was in the process of trying to place her in a safe environment. The trial court found this sufficient to show that the examination took place for the diagnosis and treatment of the victim’s condition. As our Supreme Court stated in *Conn*, part of the treatment of a victim of sexual abuse is to ensure that the child is removed from the abusive environment. And the fact that an examination aids an investigation does not mean that it was primarily conducted for the purpose of litigation. *Van Tassel, supra* at 659-660. An unprejudiced person could not find that no justification existed for the trial court’s ruling. Therefore, we find that the trial court did not abuse its discretion in finding that Dr. Gushurst examined the victim for the purpose of medical diagnosis or treatment.

Defendant next contends that, even if the exam was medically necessary, the admission of the statements was an abuse of discretion because the statements were not sufficiently reliable. Our Supreme Court in *Meeboer, supra* at 324, stated that, in determining the trustworthiness of a child’s statements in such situations, trial courts must consider the totality of the surrounding circumstances. It provided a list that is “neither inclusive nor exclusive” of factors courts should consider, including the “age and maturity of the child” and the “existence of or lack of motive to fabricate.” *Id.* at 324-326. Further, the Court held that corroborative evidence, such as physical evidence of an assault or evidence that the assailant had the opportunity to commit the assault, increases the reliability of the hearsay statement. *Id.* at 325-326.

In the instant case, the trial court found that the victim’s age at the time she first disclosed the abuse weighed in favor of a finding that her statements were reliable. It noted that although a three-year-old child does not appreciate the importance of telling the truth, “the child was too young to falsify maliciously or deliberately, and there was no known motive for her to do so.” Additionally, the trial court found that the corroborating evidence supported the statements’

trustworthiness. The victim initially disclosed the abuse to her grandmother in a spontaneous manner and she identified a picture of the male genitalia in an encyclopedia without suggestion. And the doctor's findings from the physical exam corroborate the report given by the child. Based on the holding in *Meeboer*, this Court cannot find that the trial court's decision regarding the reliability of the victim's statements lacked any justification or has an abuse of discretion. Therefore, we affirm the trial court's ruling.

Defendant also argues that the trial court erred in calculating his score under the sentencing guidelines by assessing fifteen points for "predatory conduct" under offense variable 10 (OV 10). MCL 777.40(3)(a) defines predatory conduct as "preoffense conduct directed at a victim for the primary purpose of victimization." But in the instant case, the trial court specifically found the testimony regarding preoffense conduct too speculative to adopt. Further, the factors it cited in support of its finding only refer to the victim's age and the domestic relationship she had with the victim. These factors are properly considered in determining the existence of exploitation under MCL 777.40(1)(b). If they were to be construed as also providing sufficient support for a finding of predatory conduct under MCL 777.40(1)(a), then MCL 777.40(1)(b) would be rendered superfluous. Courts must "avoid any construction which would render any part of the statute surplusage or nugatory." *People v Borchard-Ruhland*, 460 Mich 278, 285; 597 NW2d 1 (1999), citing *Altman v Meridian Twp*, 439 Mich 523, 635; 487 NW2d 155 (1992). Thus, we agree that the trial court abused its discretion scoring defendant's OV 10 at fifteen rather than ten points.¹

Defendant next contends that the trial court erred in imposing a sentence above the range dictated by the guidelines because it failed to articulate substantial and compelling reasons for doing so and the sentence of life in prison was disproportionate to his crime. Despite our conclusion that the trial court incorrectly calculated the range of sentences available under the guidelines, we disagree.

In calculating defendant's score under the sentencing guidelines, the trial court determined his minimum sentence range to be 108 to 180 months. But the correct range should have been 81 to 135 months.

Generally, a trial court must choose a minimum sentence within the range provided by the sentencing guidelines. *People v Lowery*, 258 Mich App 167, 169-170; 673 NW2d 107 (2003) (citations omitted.) But under MCL 769.34(3), a trial court may depart from the statutory guidelines "if it has substantial and compelling reasons to do so, and states those reasons on the record." *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003), citing *People v Babcock*, 244 Mich App 64, 72; 624 NW2d 479 (2000) (*Babcock I*). And under MCL 769.34, a court cannot

¹ We note that the application of the majority opinion announced *Blakely v Washington*, ___ US___; 159 L Ed2d 403; 124 S Ct 2531 (2004), has been rejected by our Supreme Court in *People v Claypool*, ___ Mich ___; ___ NW2d ___ (Docket No. 122696, decided July 22, 2004).

base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range, unless the court finds from the facts in the court record that the characteristic has been given inadequate or disproportionate weight. [*Id.*]

In *People v Babcock*, 469 Mich 247, 257; 666 NW2d 231 (2003) (*Babcock III*), our Supreme Court defined substantial and compelling as follows:

A “substantial and compelling reason” must be construed to mean an “objective and verifiable” reason that “‘keenly’ or ‘irresistibly’ grabs our attention”; is “of ‘considerable worth’ in deciding the length of a sentence”; and “exists only in exceptional cases.” [*Id.* quoting *Fields*, *supra* at 62, 67-68.]

Additionally, the phrase “objective and verifiable” means that the facts considered must consist of “actions or occurrences that are external to the minds of judge, defendant, and others involved in making the decision and must be capable of being confirmed.” *Abramski*, *supra* at 74, citing *People v Hill*, 192 Mich App 102, 112; 480 NW2d 913 (1991).

The existence of a particular factor considered during sentencing is a factual determination for the trial court and is reviewed for clear error. *Babcock III*, *supra* at 264-265 (citations omitted). Whether a factor is objective and verifiable is reviewed de novo, and a trial court’s determination that the objective and verifiable factors present in a particular case are substantial and compelling reasons to depart from the statutory minimum sentence is reviewed for abuse of discretion. *Id.* at 264-265. An abuse of discretion occurs when a trial court chooses an outcome falling outside the principled range of outcomes. *Id.* at 269.

The principle of proportionality provides the standard against which allegedly substantial and compelling reasons cited in support of a departure must be assessed. *Id.* at 262. Our Supreme Court explained as follows:

[I]f there are substantial and compelling reasons that lead the trial court to believe that a sentence within the guidelines range is not proportionate to the seriousness of the defendant’s conduct and to the seriousness of his criminal history, the trial court should depart from the guidelines. Additionally, in departing from the guidelines range, the trial court must consider whether its sentence is proportionate to the seriousness of the defendant’s conduct and his criminal history because, if it is not, the trial court’s departure is necessarily not justified by a substantial and compelling reason. [*Id.* at 264.]

In the instant case, the first reason for departure articulated by the trial court was that the sentencing guidelines failed to distinguish between a sexual assault committed against a twelve-year-old victim and one committed against a three-year-old. It stated that the extreme vulnerability of a younger victim has been given inadequate weight. Similar findings have been found to provide substantial and compelling grounds for a departure. *People v Armstrong*, 247 Mich App 423, 426; 636 NW2d 785 (2001). For instance, in *Armstrong*, this Court noted that the guidelines fail to consider

the effect on the family occasioned by the victim's loss of trust in all men, including his own father, or the effect on the victim and his sister from having to learn about sexual matters at such a young age. [*Id.* at 425-426.]

Like the judge in *Armstrong*, the trial court here did not abuse its discretion in finding that the guidelines gave the age of the victim inadequate weight and that this constituted a substantial and compelling reason for departure.

The trial court also found that the “protection of other young vulnerable potential victims” constituted a second substantial and compelling reason for imposing a harsher sentence. In support of this finding, it stated that defendant was “an unlikely candidate for rehabilitation because he denied responsibility” for his actions. The trial court noted that the psychological evaluation prepared for defendant's PSIR indicated that defendant had a “significant number of adult-child sexual boundary concerns” and was at a high risk to become a repeat offender. During the sentencing hearing, the court explained that offenders who deny committing the offense have low prospects for rehabilitation.

When imposing a sentence, a trial court may consider a defendant's refusal to express remorse. *People v Houston*, 448 Mich 312, 323; 532 NW2d 508 (1994). If the record shows “that the court did no more than address the factor of remorsefulness as it bore upon defendant's rehabilitation, then the court's reference to a defendant's persistent claim of innocence will not amount to error requiring reversal.” *People v Wesley*, 428 Mich 708, 713; 411 NW2d 159 (1987). Based on this standard, the trial court properly assessed defendant's refusal to take responsibility for his actions as it related to his potential for rehabilitation. Both defendant's continued denial that the offense occurred and his scores on the psychological evaluation are actions or occurrences external to the mind the trial court and constitute “objective and verifiable” factors. *Abramski, supra* at 74. We find that trial court's reliance on these factors did not result in a decision that fell outside the principled range of outcomes. Therefore, it did not abuse its discretion in determining that they constituted substantial and compelling reasons for departing from the statutory minimum sentence.

Additionally, the trial court's imposition of a life sentence does not violate the principle of proportionality. Under MCL 750.520b(2), CSC I is punishable by imprisonment “for life or for any term of years.” *People v Lemons*, 454 Mich 234, 258; 562 NW2d 447 (1997). In the instant case, defendant correctly points out that he has no previous adult felony convictions. And the trial court stated that the “concept of punishment is addressable by a sentence within the guidelines.” Nevertheless, in analyzing the seriousness of defendant's conduct, the trial court found that protection of the public required a life sentence. Because this conclusion was based on substantial and compelling reasons, the trial court was justified in departing from the guidelines and did not impose a disproportionate sentence. *Babcock III, supra* at 264.

As noted above, the trial court erred in calculating the appropriate range for defendant's sentence under the guidelines. In *Hicks, supra* at 535, the trial court similarly erred in its determination of the guideline range but sentenced the defendant to a term above that range. This Court found that because the trial court intended to remove the defendant from society for a lengthy period and determined that it “would have rendered the same sentence regardless of the guidelines score,” the error in scoring did not require remand for resentencing. *Id.* at 537 n 8. In the instant case, the trial court's concern for the protection of society would not change based on

the scoring of the guidelines. Thus, as in *Hicks*, we find that the trial court's error does not require a remand, and affirm defendant's sentence.

Affirmed.

/s/ Karen M. Fort Hood

/s/ Pat M. Donofrio

/s/ Stephen L. Borrello